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Supreme Court of the United States

OCTOBER TERM, 1946

No. 47

GEORGE E. HICKMAN, as Administrator of the Estate of Norman E. Hickman, Deceased,

Petitioner,

vs.

JOHN M. TAYLOR and GEORGE ANDERSON, Individually and Trading as Taylor & Anderson Towing and Lighterage Company, *et al.*

BRIEF OF THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE

B. ALLSTON MOORE,
JAMES W. RYAN,
J. HARRY LABRUM,
FRANCIS H. INGE,
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Opinions of Courts Below

Hickman v. *Taylor* (R. 62a), 4 F. R. D. 479 (Dist. Ct. E. D. Pa.);
Hickman v. *Taylor* (R. 81), 153 F. 2d 212 (C. C. A. 3).

I.

The present Rules of Civil Procedure for the District Courts of the United States* were plainly not intended by the Advisory Committee, which, in co-

* Adopted by this Court pursuant to the Act of June 19, 1934, chapter 651 (48 Stat. 1064; U. S. C., title 28, sec. 723c), effective September 16, 1938.

operation with the American Bar Association,* drafted them for this Court, to extend discovery so as to embrace the opposing lawyer's memoranda and hearsay information constituting part of his preparation for trial. Such lawyer's memoranda and hearsay information are not mentioned or included in the Rules as to discovery, and the fact is that up to the time that the Rules were adopted no amendment or addition proposing such inclusion was presented, discussed, voted upon, or recommended by either the Advisory Committee or the American Bar Association. Since time immemorial such lawyer's memoranda and hearsay information have been regarded as an essential and private part of counsel's preparation for trial in the exercise of his function as a member of the Bar or officer of the Court independently representing in a quasi-public character as part of the judicial process one of the opposing parties in the litigation. Neither the Advisory Committee nor the American Bar Association at that time contemplated, intended, or recommended any change in that situation. The orderly and efficient functioning of our system of judicial process depends upon the independent functioning of the respective members of the Bar representing the opposing parties. Such independent functioning, and the maintenance of professional confidence, candor and trust between client and lawyer, would obviously be almost impossible if disclosure were required to the opposing lawyer of

* Federal Rules of Civil Procedure and Proceedings of the American Bar Association Institute, Cleveland, 1938 (Chicago: Am. Bar Assn., 1938), p. iii: "It has been said so many times that lawyers cannot or will not cooperate that many people have unfortunately accepted the saying as truth. The history of the adoption of the Rules, like that of every major achievement of the American Bar Association, is a demonstration of the falsity of the saying."

the other lawyer's memoranda and hearsay information in preparation for trial. There would also be serious interference of a practical nature with the orderly and independent presentation of the testimony and other evidence of the respective parties before the Court. Moreover, aside from such interference with orderly judicial process, any reasonable necessity or propriety of such disclosure is questionable. Such lawyer's memoranda and hearsay information do not come into existence until long after the events or facts constituting the cause of action have occurred and after the legal rights of the parties have become fixed. They are in no sense a part of the facts, events, or evidence which constitute or show the cause of action and which came into existence long before the lawyer was retained to prosecute or defend the litigation resulting from the occurrence of those facts or events.

The novel decision of the District Court in the present case (R. 62a) that the existing Rules as to discovery are applicable to lawyer's memoranda or hearsay information in preparation for trial after the material events of the case have occurred and the cause of action has accrued, or were intended to be so applicable, is simply an error or anomaly. It is in conflict with the uniform and almost daily interpretation which has been made of those Rules by all other Federal Courts throughout the period of more than eight years during which they have governed the practice in the District Courts. This Court has in many cases held that the uniform interpretation of a statute over a long period of years by the administrative officials of the Government charged with the duty of interpreting and applying it has the greatest persuasive weight and, unless clearly wrong,

will be accepted by this Court as the proper interpretation of the statute.

Wisconsin v. *Illinois*, 278 U. S. 367;
United States v. *Furrar*, 281 U. S. 624;
Merchants Nat. Bank v. *Commr. of Internal Revenue*, 320 U. S. 256;
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Louisville & N. R. Co. v. *U. S.*, 282 U. S. 740;
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Federal Trade Com. v. *Bunte Bros.*, 312 U. S. 349;
Helvering v. *Winnill*, 305 U. S. 79;
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United States v. *Chicago R. Co.*, 288 U. S. 1;
Federal Land Bank v. *Warner*, 292 U. S. 53;
Southern Pacific Co. v. *United States*, 307 U. S. 393;
United States v. *Jackson*, 280 U. S. 183;
United States v. *Citizens Loan & T. Co.*, 316 U. S. 209.

Such interpretation of a statute by administrative officials is always of persuasive weight as to its proper legal interpretation even if the interpretation has been made in only one or a few instances.

Billings v. *Truesdell*, 321 U. S. 542, 548;
Adams v. *United States*, 319 U. S. 312;
Great Northern L. Ins. Co. v. *Read*, 322 U. S. 47;

Ford Motor Co. v. *Department of the Treasury*, 323 U. S. 495;
Skidmore v. *Swift & Co.*, 323 U. S. 134;
Helvering v. *Griffith*, 318 U. S. 371;
Sanford v. *Commr. of Internal Revenue*, 308 U. S. 39;
Gray v. *Powell*, 314 U. S. 402.

The Rules, having been adopted pursuant to statutory authority, have of course the legal effect of statute.

Billings v. *Truesdell*, 321 U. S. 542, 551;
Standard Oil Co. v. *Johnson*, 316 U. S. 481, 484.

The Advisory Committee, by divided vote, has recently, on August 26, 1946, proposed an amendment to the Rules which would, in certain instances, extend discovery so as to embrace the type of lawyer's memoranda and hearsay information which the District Court erroneously held in the present case is discoverable under the existing Rules. That amendment, however, has been so recently proposed that the American Bar Association, this Court, and the other persons and officials directly interested have not yet had a reasonable opportunity to discuss and consider it and to express an opinion with respect to whether or not the existing Rules should be changed so as to add such an amendment. The current issue of the American Bar Association Journal (October, 1946, vol. 32, pp. 629-630) states in part as follows:

"The Advisory Committee's submission of its proposed Amendments was made on August 26. The release of the draft condemnation rule for study was authorized by the Committee on Sep-

tember 6. The time before this issue of the Journal goes to press (September 9) has been insufficient to permit our preparation of an adequate analysis and comment.

Walter P. Armstrong, of the Board of Editors, who has been following the amendments closely, prepared for the West Publishing Company an informative analysis and well-annotated commentary, which has been published in the Federal Reporter (156 Fed. 2nd, No. 2, pages xix-xxxix) and the Federal Supplement (Vol. 66; No. 3; Advance Sheets, pages XIX-XXXIX), and in 5 F. R. D. 339. As nearly all of our readers have access to these Advance Sheets, we refer to his article those who wish to read an analysis of the amendments. The condemnation rule, of course, is not included.

In his commentary on the proposed amendments as to 'discovery,' Mr. Armstrong said, in part:

"The most perplexing problem that confronted the Committee in dealing with discovery was the extent to which a party should be permitted to delve into an adversary's investigation file which contains statements of witnesses, photographs, maps, etc., procured in preparation for trial. The First and Second Drafts merely provided that the court could impose designated restrictions "upon inquiry into papers and documents prepared or obtained by the adverse party in the preparation of the case for trial." This left the matter entirely at the discretion of the court. It was suggested that it did not solve the problem nor make for uniformity because the probable result would be that each district judge would adopt in his own district an inflexible rule. (Armstrong, Second Draft of Proposed Amendments,

page 498.) Indeed, the Committee itself deprecated the fact that the proposed amendment did not establish any standard for the exercise of judicial discretion. In a tone of despair it appealed to the Bar: "If members of the profession can formulate a general statement of the standard for exercising discretion, the Committee will welcome it and give it careful consideration." (Second Draft, pages 39, 40.)

After the release of the Second Draft the Circuit Court of Appeals for the Third Circuit dealt with the subject in *Hickman* v. *Taylor* (153 F. 2d 212). * * *

There is no Amendment about which there is a greater or stronger division of opinion among members of the Bar. The Amendment was first fully released when the Report was filed with the Court; therefore there has been* and will be no opportunity for general discussion. This in itself is unfortunate. * * *

The draftsmanship of this Amendment leaves something to be desired. Probably one of its primary purposes was, in exceptional cases, to broaden the right of discovery beyond the limitation imposed by *Hickman* v. *Taylor*. Yet its approach is negative. It is placed under Rule 30(b) titled "Orders for Protection of Parties and Deponents". The clear implication is that in the cases of hardship provided for, statements of witnesses and other similar objective preparations for trial are discoverable even when they are the "work product" of a lawyer. This construction

* An exception is the vigorous discussion of both *Hickman* v. *Taylor* and the Amendment, at the last Judicial Conference of the Third Circuit. Among the participants were counsel and *amici curiae* in *Hickman* v. *Taylor*. See transcript, Ninth Annual Judicial Conference of the Third Judicial Circuit of the United States, pages 21 *et seq.*

> is further strengthened when the Amendment is considered in connection with the broad scope of pre-trial inquiry specifically permitted under Rule 26, and made expressly applicable to all methods of discovery. It will probably be sometimes argued, however, that the Amendment is a further immunity to discovery and is in addition to the privilege accorded a lawyer under *Hickman* v. *Taylor.*' "

The drafting, recommending, and adopting of an amendment to, or extension of, the Rules of so novel, serious, and sweeping a nature as to embrace discovery to opposing counsel of a lawyer's memoranda and hearsay information in preparation for trial, is not a matter which should be done hurriedly and without proper consideration. It should not be done merely incidentally in connection with the decision of a particular law suit which is pending between two private parties and which must be quickly determined. The customary and proper method is for the Court to give the Bar as a whole, all of whom are directly interested, a reasonable opportunity to consider any important proposed change in the Rules. Such reasonable opportunity has not yet been given to the Bar with respect to the amendment proposed on August 26, 1946, by divided vote of the Advisory Committee. The present status is that (Am. Bar Assn. Journal, Oct. 1946, vol. 32, p. 630):

> "There is no Amendment about which there is a greater or stronger division of opinion among members of the Bar."

The fact that such a recently-proposed Amendment has already encountered strong and widespread opposition among the Bar, and that the exact nature,

extent, and particular grounds of the opposition have not yet been considered or determined, make it evident that the proposed Amendment is serious in character and that its form and substance, and the question of its desirability or necessity, or of alternatives, should be examined further. The various and vigorously-expressed objections to it should be considered with deliberation so that the final draft will represent the best and most impartial thought in the public interest of both Bench and Bar. Precipitate or ill-considered action in such an important matter in which an overwhelming majority of both Bench and Bar may strongly condemn the precipitate action taken would, we respectfully submit, be unreasonable and imprudent.

Accordingly the American Bar Association respectfully suggests to the Court that the present case of *Hickman* v. *Taylor* should be determined according to the Rules as they now exist, which means that the decision of the United States Circuit Court of Appeals should be affirmed.

The American Bar Association further suggests and requests that this Court give the American Bar a reasonable opportunity to consider and make a recommendation to the Court and to the Advisory Committee with respect to the amendment proposed and released for publication by that Committee on August 26, 1946.

II.

The District Court in the present case evidently realized that there was at least great doubt whether the existing Rules warranted its novel decision, because in its opinion (R. 62a) it makes an effort to

support its decision independently of those Rules. It resorts in substance to an earlier rule of law making admissible in evidence, and therefore discoverable, the records and reports contemporaneously made in ordinary course of business by a party or his regular employee having knowledge of the facts or events recorded or reported. Then it proceeds to say or assume that the lawyer, notwithstanding he had been retained merely to "defend whatever litigation arose" (R. 63a) was "acting primarily as an investigator" (R. 66a) or employee of the client for the purpose of reporting facts to his client, and that "the lawyer is merely the medium through which his client becomes apprised of facts" (R. 66a). It wholly ignores the lawyer's function and duty in the judicial process, as a member of the Bar and officer of the Court who has been retained merely to defend litigation (R. 63a), to ascertain the facts and the detailed proposed testimony and evidence from the client and the client's employees, and to report or present those facts and evidence to the Court. On the basis of these premises or arbitrary assumptions, the District Court reaches the novel and astonishing conclusion that the rule of law with respect to admissibility and discoverability of a party's records and reports made contemporaneously in ordinary course of business applies to a lawyer's later memoranda and hearsay information which were clearly part of his preparation for trial during the period from March 4, 1943, to March 29, 1943 (R. 63a). That was four months after November 25, 1943, when all of the material events of the case had occurred, the cause of action had accrued, and the respective legal rights of the parties had become fixed (R. 62a).

III.

In the common law Courts, pleading and practice have always permitted a defendant to file merely a general or specific denial and thus, as it is called, "put the plaintiff to his proof". In the criminal law Courts this has been regarded as to a large extent necessary in order to protect the presumption of the accused's innocence of the crime charged. Such method often results in injustice, however, in both the common law and criminal Courts in the special case in which the defendant has exclusive knowledge and possession of, or access to, the evidence establishing the circumstances of the accident or alleged crime involved. Disclosure of the defendant's "story" in such special cases is made, if ever, at the trial. The defendant, however, may merely move to dismiss at the end of the plaintiff's case, and the real story of the accident may never become known to the plaintiff or the Court. Appreciating this, the common law Courts, without changing their fundamental general method, have in recent times resorted in such special cases to a variety of extraordinary remedies to enable the plaintiff to ascertain the defendant's story, obtain access to the existing physical evidence, and make reasonable preparation for trial. The American Bar Association, as representative of practically the entire active Bar, cooperated to the greatest extent possible in the very extensive and widespread effort which was made by Bench and Bar to achieve greater practical justice under modern conditions of great enterprises and organizations and of a largely-industrialized economy by bringing order and efficiency into this system of practice in the Federal common law and equity courts. This resulted in adoption of

the Federal Rules of Civil Procedure on September 16, 1938. The Rules as a whole have proven to be fair and effective in daily Court practice over a long period of more than eight years, and their interpretation by the Federal Courts throughout the country in the particular respects challenged in the present case has been uniform and to the contrary of the District Court's decision in this case. The suggestion of petitioner's attorney and of the District Court is in substance that the present Rules should be amended or given a forced interpretation in order to afford the novel, startling, and desperate remedy of permitting counsel for one party to have access to the lawyer's memoranda and hearsay information of counsel for the opposing party. To any Court or experienced trial counsel, the disorder, confusion, and practical injustice in the functioning of the judicial process which would result from adoption of such an ill-considered suggestion are obvious, and the necessity for its adoption as against other alternatives, either in existing Rules or in a future carefully-considered Amendment, is clearly not established.

It appears that the present case is peculiar in that it is really an admiralty case which, at the choice of plaintiff's counsel, has gotten into a common law court. The admiralty Courts have never found it necessary, in the interest of justice, to resort to the desperate remedy suggested by plaintiff's counsel in this case. The question of how the admiralty Courts have succeeded in devising a practice which achieves justice in such cases without resort to the desperate remedy now suggested by plaintiff's counsel is therefore important and significant. It bears directly on the question whether or not it is necessary to resort to such a desperate remedy which is itself fraught with harmful

results of a different and obviously more serious and extensive nature to the entire system of effective and orderly functioning of the judicial process.

In the admiralty, the case which the common law courts regard as a special case requiring extraordinary remedy or presumption, namely, a case in which one party has almost exclusive knowledge and possession of, or access to, the facts, physical evidence and circumstances of the accident, is the general or usual case. Cargo is delivered by a vessel in damaged condition; the shipowner through his employees, the master and crew of the vessel, has exclusive knowledge of the circumstances or accident giving rise to the damage, and has possession of the physical evidence. Or two vessels are in collision; neither knows what was being done on board the other vessel, or what the physical evidence or circumstances may be on the other vessel, excepting as observed from a distance during the brief period preceding collision. Accordingly the whole practice of the admiralty is designed to afford a fair disclosure of the facts and physical evidence to the other party or vessel involved so that reasonable preparation for trial is possible. A general or specific denial by a respondent of the allegations in the libel is not sufficient. The respondent must allege his version of the facts of the accident, and of the circumstances leading up to it, and must reply to each article in the libel. Admiralty Rule 22 (promulgated by this Court on Dec. 6, 1920, to take effect March 7, 1921) provides in part as follows:

> "The libel shall also propound and allege in distinct articles the various allegations of fact upon which the libellant relies in support of his suit, so that the respondent or claimant may be,

> enabled to answer distinctly and separately the several matters contained in each article; * * *."

Admiralty Rule 26 provides in part as follows:

> "* * * and all answers shall be full and explicit and distinct as to each separate article and separate allegation in the libel, in the same order as numbered in the libel, * * *."

A custom of mariners since time immemorial, supplemented by a statute, requires each vessel to keep a daily and hourly log book or record book in which the physical operations and conditions on the vessel, and the movements, courses, weather and sea conditions, and orders, are chronologically and continuously recorded, as well as any changes made or occurring therein, and the times of such change, and the circumstances of any accident occurring, and the names of the persons on watch at the times of occurrence of the various events and of the issuance of orders.

Promptly after damage to vessel or cargo is discovered, notice must be given to all interested parties and opportunity afforded to attend, through skilled surveyor representatives, a survey or examination at a specified time and place, or else a strong presumption or adverse inference is drawn against the party failing to give such notice.

Another statute requires the master of the vessel to make a detailed written report of every accident to the vessel to Steamboat Inspectors, who thereupon hold an investigation or hearing at which the principal officers and crew involved are called as witnesses, and a transcript is afforded to all interested parties.

The charts and all log books, records, reports and material physical evidence involved must in so far as possible be preserved by the shipowner, and be made

available for examination on certain reasonable conditions or when required by Court order.

The witnesses or members of the crew involved in the particular occurrence are designated as necessary witnesses who must be called by the shipowner to prevent a strong adverse inference.

The British Admiralty Courts also in collision cases require the filing in a sealed envelope by both libellant and respondent of a Preliminary Act within a few days after suit is begun. This Preliminary Act states the particulars or detailed circumstances of the collision, and is opened immediately the pleadings are completed, or earlier on consent of both parties. Roscoe's Admiralty Practice, 4th edition (London: Stevens & Sons, 1920), pp. 327-329. In neither the British nor the American Admiralty Courts is discovery or inspection permitted of the opposing lawyer's memoranda or hearsay information. Roscoe's Admiralty Practice, 4th ed., pp. 344-347.

Some adaptation by the common law Courts of the Admiralty Practice above-described in the special cases, like the present, in which in substance an admiralty case is being brought on the common law side of the Court, would seem to be more desirable by Amendment to the present Rules or by a statute, rather than to throw the whole judicial process into confusion and disorder by extending discovery to the opposing lawyer's memoranda and hearsay information by a precipitate and forced interpretation of the present Rules. At least a reasonable opportunity should be given to the Bar to consider and determine the proper form and substance of any proposed Amendment to the Rules.

CONCLUSION

The decree in this case of the United States Circuit Court of Appeals for the Third Circuit should be affirmed.

Dated: October 21, 1946.

Respectfully submitted,

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